SUPREME COURT OF THE UNITED STATES

October Term 1946

No. 534

LOUIS DABNEY SMITH *Petitioner*

v.

UNITED STATES OF AMERICA *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioner's
PETITION FOR REHEARING

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INDEX

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MAY IT PLEASE THE COURT:

Within time fixed by rules of the court and the order enlarging the time, petitioner files and presents this his petition for rehearing and for recall and stay of the mandate pending disposition of this petition for rehearing and his petition for writ of certiorari. The court is requested to grant the petition for rehearing, order the petition for writ of certiorari granted, recall the mandate and order its stay pending final determination of this cause upon the petition for writ of certiorari.

Grounds

ONE

This court should have exercised its discretion and granted the writ because the Second Circuit Court of Appeals, since the filing of the petition for writ of certiorari in this case, has decided the case of *United States ex rel. Kulick* v. *Kennedy,* directly conflicting with the decision of the court below on the effect of the failure to make a record of the oral evidence given by petitioner at his personal appearance before the local board.

TWO

This court should have exercised its discretion and granted the writ because the question of whether the draft boards acted without basis in fact in classifying petitioner and denying his claim for exemption is identical with the question presented to this court in the petition for writ of certiorari in *Sunal,* petitioner, v. *Large,* No. 535 October Term 1946, now pending, and in *United States ex rel. Kulick* v. *Kennedy,* decided by the Second Circuit Court of Appeals and which the Solicitor General will present in the near future to this court upon petition for writ of certiorari.

THREE

This court should have exercised its discretion and granted the writ because the decision of the court below that the classification of petitioner and the denial of his claim for exemption as a minister of religion had basis in fact is in direct conflict with the holding of the Seventh Circuit Court of Appeals in *United States ex rel. Hull* v. *Stalter,* 151 F. 2d 633.

FOUR

This court should have exercised its discretion and granted the writ for each and every one of the reasons stated in the petition for the writ.

DISCUSSION
and Reasons Supporting Petition

In *United States ex rel. Kulick* v. *Kennedy,* decided October 29, 1946, by the Second Circuit Court of Appeals, it was held that failure of the draft board to reduce to writing the testimony Kulick gave before the local board at a personal appearance was a procedural violation which invalidated the administrative process. In that case Judge Learned Hand said:

" . . . At that time he submitted an affidavit and a written statement, asserting that he was a 'regular or ordained minister' of Jehovah's Witnesses; and he testified at length. (There was no stenographer present, and the only record of what he said is his own testimony at the trial and that of one member of the board whom he then called.)

" . . . He appeared on the 11th, but there is no record of what took place except that his classification was not disturbed.

" . . . Be that as it may, in the case at bar that was not the sum of what Kulick showed, and tried to show, and incidentally, as we have said, the record before the board did not preserve any testimony there taken. Surely it can never be tenable to make critical what chances to be preserved in that record. Evidence is no less evidence because it is not recorded; and anything which in fact tends to establish that the accused did not have a fair hearing must be available in support of his defence, from whatever source it comes."

In connection with the contention that a substantial question is presented to this court that ought to be decided but which has not been decided by this court on the issue of the board's failure to reduce to writing the oral evidence given by Smith, this court is respectfully referred to the petition for writ of certiorari: See pages 8-13, 21-26.

Also, the court is referred to petitioner's reply to the Government's brief in opposition to the petition for writ of certiorari, pages 1-7.

In the pending case of *Sunal* v. *Large*, No. 535 October Term 1946, it is the position of the Government that the only question presented to this court is whether or not there was basis in fact for the classification made by the draft board. If this is true, and the court is prepared to consider that question, then the *Sunal* case presents to this court the identical question presented to this court in this *Smith* case.

The Government also purposes to present to this court the same question in *United States ex rel. Kulick* v. *Kennedy*, in its petition for writ of certiorari to be filed in due course.

The *Sunal* and *Kulick* cases raise the issue of whether a full-time minister of the gospel, whose life is devoted to his work as a minister, may be deprived of his claim for exemption because he performs part-time secular work. In the *Sunal* case Sunal devoted an average of 140 hours per month to secular work as a garage mechanic, which did not prevent him from regularly discharging his ministerial duties. In the *Kulick* case the registrant performed services as an artist's model to the extent of three or four hours weekly. This also did not interfere with regular performance of his ministerial services or deprive him of his status as a full-time minister of the Watchtower Bible and Tract Society.

In the case at bar Smith did not do any secular work whatever. It is true that at the time he was classified by the local board he was attending the University of South Carolina. However, this did not prevent him from devoting upward of 90 hours per month to his ministerial work. The undisputed evidence showed that Smith was a minister and stood in relation to the Columbia congregation of Jehovah's witnesses in the same way as did ministers of orthodox faiths.

The court below considered Smith's attendance at college as ground for the classification given him by the draft board.

If in the *Sunal* and *Kulick* cases the performance of secular work is to be considered as ground for denial of the claim for exemption, then *in fairness* the court should also consider and review whether Smith's attendance at the time of the local board's classifying him, justified the local board's denial of Smith's claim for exemption.

The undisputed evidence showed that at the time Smith was finally classified by the board of appeal on June 15, 1943 [8, 141-148] *, he was actually engaged in the full-time ministry, having entered it on June 1, 1943, after quitting college at the end of the semester in May 1943. [140, 141; see also other parts of the record which show that before he was finally classified by the board of appeal he was engaged in full-time missionary evangelistic work: pages 30-31, 36-37, 146-148.]

It was the duty of the draft boards to classify petitioner according to his actual status as of the date of the final classification.

In this respect the case at bar is almost identical with the *Hull* case, *supra.* (151 F. 2d 633) Hull, at the time he registered, was regularly engaged in full-time secular work as well as in part-time ministerial activity. Shortly before his final classification he stated that he expected to quit his secular job and engage in the full-time ministry on September 1, 1941. However, due to matters over which he had no control he was unable to begin his full-time ministerial work until about October 1. On September 18, 1941, the board placed him in Class I-A-O. He afterward appealed and was finally classified IV-E, whereby his claim for exemption as a minister of religion was denied. The court held that he was entitled to be classified by the board of appeal according to his status at the time of his classification by the board of appeal. At such time he was engaged

* Bracketed figures denote pages of printed record.

in full-time missionary work. This is identically the case with Smith.

In the *Hull* case the court said: "We see no reason why a registrant with a non-exempt status at the time of registration should not subsequently be permitted to show that his status has changed or, conversely, why one who is exempt at the time of registration should not afterwards be shown to be non-exempt. . . . The point perhaps is better illustrated by referring to certain officials who are deferred from military service while holding office. Suppose a registrant who held no office at the time of his registration and was therefore liable for military service should subsequently be elected or appointed judge of a court or any other office mentioned in the Act. We suppose it would not be seriously contended but that he would be permitted to show his changed status any time prior to his induction into service and therefore be entitled to deferment. And we see no reason why a registrant claiming to be exempt as a minister should not be classified according to his status at the time of his final classification rather than that at the time of registration."

Moreover the facts in the *Smith* case with respect to ministerial status are identical with the facts in the *Hull* case with respect to ministerial status.

At the time Smith registered he was a part-time minister.

At the time Hull registered he was a part-time minister.

Before Smith was finally classified by his local board he informed the board that he intended to go into the ministry full time. That is exactly what Hull told his local board before he was classified.

Subsequent to the classification by the local board, but before the classification by the board of appeal in the *Hull* case, Hull actually entered into the full-time missionary work.

In the *Smith* case, subsequent to his classification by the local board, but before the classification by the board of

appeal, Smith actually entered into the full-time missionary work.

In the *Hull* case, as well as in this *Smith* case, the draft boards rely on the same grounds for denying the claim for exemption. In the *Hull* case the Seventh Circuit Court disposed of these excuses, urged as grounds for denial, in the following language:

"In our view, there are only two circumstances which could at any time have furnished the slightest justification for the Board's refusal to classify relator as a minister, (1) information contained in his questionnaire and (2) the fact that he was not registered with the National Headquarters of the Selective Service System as a minister. True, his questionnaire disclosed that he was not a full time minister, part of his time being devoted to secular occupations. The questionnaire, however, also disclosed that commencing September 1, 1941, he expected to cease his secular activities and devote all of his time to ministerial work. That his intention in this respect was fully performed is not open to dispute. There is not a scintilla of evidence upon which a contrary conclusion or even a reasonable inference could be predicated. The fact that his name was not included as a minister of Jehovah's Witnesses at National Headquarters of the Selective Service is of little or no consequence under the facts of the case. While it perhaps was a circumstance to be considered by the Board, it constituted no proof as to relator's actual status. Furthermore, the practice of placing names upon this list was discontinued by the National Director of Selective Service on November 2, 1942 (relator was finally classified February 3, 1943). We have serious doubt that there was any justification for the Board's refusal originally to classify relator in 4-D. Whatever he thought, however, of the Board's original action in this respect, there can be no question but that subsequent proof conclusively demonstrated that he was entitled to such classification."

There is a direct conflict between the holding of the court of appeals in the *Hull* case and that of the court below in the *Smith* case and in the *Sunal* case. The court below referred to and made its *Sunal* opinion a part of its opinion in this *Smith* case, saying, "See also the discussion of this subject in the concluding portion of the opinion of this court filed contemporaneously herewith in *United States ex rel. Sunal* v. *Large, Superintendent.*" [346]

The court below recognized that its decision was in conflict with the decision of the Seventh Circuit Court in the *Hull* case. In the *Sunal* case, immediately following note 7 of its opinion, the court below referred to the *Hull* case, as follows: "Cf. *United States ex rel. Hull* v. *Stalter*, 151 F. 2d 633." See record in the *Sunal* case, page 117.

It is respectfully submitted that the direct conflict upon this important federal question (undecided by this court) in the decisions of the Fourth and Seventh Circuit Courts should be ground for granting the petition for writ of certiorari in this case.

Also, if this court is prepared to consider this question in the *Sunal* case and in the *Kulick* case, then the same question presented in this case should be of sufficient substance to require the granting of the writ and the full consideration of the question in this case. Indeed, the court below, in its treatment of this question in the *Smith* case, considered it along with the same question that was involved in the *Sunal* case. The *Sunal* and *Smith* cases were companion cases in the court below. In those two cases the court's two separate opinions referred to each other, and each opinion was incorporated in the other as presenting, reciprocally, related supporting reasons. Because of this circumstance it is respectfully submitted that the *Smith* case should be considered by this court along with the *Sunal* case, if, as and when the petition for writ of certiorari is granted, as well as with the *Kulick* case in event that

the writ is granted in that case subsequent to the filing of the petition for the writ by the Solicitor General.

In this case the mandate has been sent to the district court. The federal attorney threatens to bring the case on for an early trial. In order to preserve the status quo in this matter, and to avoid a conflict between the jurisdiction of the district court and that of this court in these proceedings, it is necessary for this court to recall the mandate and stay the execution thereof pending a determination of this petition for rehearing and the petition for writ of certiorari.

Conclusion

WHEREFORE petitioner prays that this court exercise its sound discretion and grant the petition for rehearing, set aside and hold for naught its former order denying the petition for writ of certiorari, recall the mandate and order the same stayed pending a determination of the case upon the petition for writ of certiorari, and that the cause be set down for argument and submission and that the judgment of the court below be reversed and the prosecution dismissed or, in the alternative, a new trial be ordered. Petitioner further prays as in his petition for writ of certiorari.

Respectfully submitted,

LOUIS DABNEY SMITH, *Petitioner*

By HAYDEN C. COVINGTON
Counsel for Petitioner

Certificate

The undersigned counsel for petitioner in the above-entitled and numbered cause hereby certifies that the foregoing petition is prepared and filed in good faith so that justice may be done, and not for the purpose of delay.

HAYDEN C. COVINGTON

December 10, 1946